

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROBERT NICKLESON,

Defendant-Appellant.

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UNPUBLISHED

November 12, 2002

No. 235373

Mason Circuit Court

LC No. 00-015720-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof\*, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty but mentally ill of one count each of attempted murder, MCL 750.91, carrying a concealed weapon, MCL 750.227, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to ten and one-half to twenty-five years in prison on the attempted murder conviction, to two to five years in prison on both the concealed weapon and carrying a weapon with unlawful intent convictions, and to the mandatory two-year consecutive term on the felony-firearm conviction. He now appeals and we remand.

Defendant's convictions arise out of an incident on October 9, 1999, at the Mason County Fruit Packer's plant where defendant was previously employed. Defendant had quit his employment a few weeks earlier. He visited the plant a few times afterwards, including a visit on October 4 when he was escorted from the plant and told not to return. He returned on October 9, dressed in camouflage, armed with a rifle and a knife. He was intercepted by a supervisor and was subdued and disarmed without a shot fired. During police interrogation, defendant admitted he had gone to the plant with the intention of shooting the supervisor and other employees.

Defendant was referred to the Forensic Center for evaluation of mental competency and criminal responsibility. He was found incompetent to stand trial, as he was at two subsequent re-evaluations. On a fourth evaluation, approximately nine months after the incident, he was found competent to stand trial. The Forensic Center for the first time also conducted a criminal responsibility evaluation. The examining psychologist, Dr. Stephen Norris, concluded that defendant was legally insane at the time of the crime.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

At trial, Dr. Norris testified on behalf of defendant, opining that defendant was a paranoid schizophrenic and lacked the substantial capacity to appreciate the wrongfulness of his conduct. The prosecutor presented no expert witness in rebuttal, concentrating instead on pointing to evidence of defendant's actions which did demonstrate that defendant appreciated that his conduct was wrong, such as defendant's hiding the weapons he used and making the statement after he was subdued that he expected the police to arrive, arrest and jail him and that he would be going to prison.

Defendant first argues on appeal that the trial court erred in finding defendant to be legally sane. The insanity defense is governed by statute in Michigan. MCL 768.21a(1) provides that a defendant is legally insane if, due to mental illness, he "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." The burden is on the defendant to prove insanity by a preponderance of the evidence. MCL 768.21a(3).

We are unable to review this issue because, while the trial court, sitting as the trier of fact, found that defendant was mentally ill and was able to conform his conduct to the requirements of the law, the trial court made no finding regarding whether defendant lacked the substantial capacity to appreciate the wrongfulness of his or her conduct. A defendant does not have to establish both that he substantially lacks the capacity to appreciate the wrongfulness of his conduct and the ability to conform his conduct to the requirements of the law. Rather, a defendant must show one or the other. Thus, in order to reject the insanity defense, the trier of fact must conclude that a defendant has failed to prove both the lack of capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.

In the case at bar, the trial court made a finding only with respect to defendant's capacity to conform his conduct to the requirements of the law, with no finding regarding whether defendant lacked the capacity to appreciate the wrongfulness of his conduct. We might be able to overlook the trial court's failure to make a finding on this point had the psychologist based his opinion on defendant's capacity to conform his conduct to the requirements of the law. However, the exact opposite is true. Dr. Norris specifically testified that his opinion was based upon a conclusion that defendant lacked the capacity to appreciate the wrongfulness of his conduct. For example, the following exchange took place during the prosecutor's cross-examination of Dr. Norris:

Q. Exactly. So what is the case here; is this one that the Defendant doesn't appreciate his wrongfulness or one that he couldn't control his behavior even though he knew it was wrong?

A. In my opinion it was mainly that he wasn't able to appreciate the wrongfulness.

Although the prosecutor presents an argument in support of a finding by the trial court that defendant did not lack the substantial capacity to appreciate the wrongfulness of his conduct, the trial court made no such finding. Thus, to rule on this issue, we would have to make the finding ourselves rather than review the trial court's finding. Because the trial court, not this Court, sat as the trier of fact, it should first make the finding and then we may review it.

Accordingly, we remand the matter to the trial court for the purpose of making findings of fact on the portion of the insanity test related to defendant's capacity to appreciate the wrongfulness of his conduct. If the trial court finds that defendant has proven by a preponderance of the evidence that he lacked the substantial capacity to appreciate the wrongfulness of his conduct, the trial court shall set aside its original judgment and enter a judgment of not guilty by reason of insanity. If the trial court finds that defendant has failed to meet his burden of proof on this issue, the trial court shall promptly file a copy of its opinion on remand, as well as transcripts of any hearings held on remand, with this Court so that we may fully review defendant's argument.

The trial court shall resolve this matter within twenty-eight days of the clerk's certification of this opinion. Any transcript or written opinion of the trial court shall be filed with the clerk of this Court within fourteen days of the trial court's resolution of this matter on remand.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof